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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-203

SATIRIS G. FASSOULIS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

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DATED: New York, New York
September 15th, 1971

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On Mailing

The Government brief infers from the private postage meter marking on the only envelope produced (GX 198), that since AIC paid the postage, it is unreasonable for us to suggest AIC's use of any other method of transmittal. Thus, according to the Government's argument, does it satisfy the need of proving mail use beyond a reasonable doubt. The Government fails to say how much the postage was. The marking shows it was 48 cents.

While relying on the private metering marking on the envelope (GX 198) for its proof of mail use, the Government carefully avoids any mention whatsoever of the missing back half of the envelope. Had mailing of the envelope actually occurred, this back half would have had to be stamped in the receiving and in the delivering post office (Postal Procedures TL-226, 333.344b). The Government's use of a mutilated exhibit from which the significant half had been removed, serves to emphasize the failure of proof.

The Government fails to mention, much less defend, the "credible inference" standard of proof of mailing proffered by the Second Circuit Court to sustain the conviction.

On Venue

The Government now asserts adequate proof of venue by invoking a postal regulation. The regulation (39 C.F.R. 144.6(b)) provides for mailing only from the post office shown in the private meter stamp. The meter stamp does not support the Government's claim of proper venue in the Southern District of New York. The post office shown on this meter marking is "New York, N.Y.". This refers to New York City. New York City includes Brooklyn and Queens, both of which are in the Eastern District of New York. Thus, even under the regulation, assuming that the sender complied with it strictly, the envelope, GX 198, (if mailed at all) could quite conveniently have been mailed in the Eastern District of New York rather than the Southern District. It was the Government's burden to show venue, not the defendant's to disprove it.

On The Conspiracy

The overt acts of mailing, set out in the four substantive counts, cannot sustain the conspiracy conviction, as the Government contends, because the judgment on those counts should be reversed for failure of proof of mailing, and failure of proof of venue, as shown above. For the same reason, the concurrent sentence doctrine, invoked by the Government, is inapplicable.

The Government cites *U.S.* v. *Bletterman* (2 C.A.), 279 F. 2d 320, as negating our argument on double jeopardy. In *Bletterman,* submission of an overt act (one among a total of six) was held harmless error even though no proof of that act was adduced. But here, the two overt acts submitted among a total of ten, were two on which defendant *was found not guilty.* Thus, *Yawn* v. *U.S.* (C.A. 5, 1957), 244 F. 2d 235, and *Ashe* v. *Swenson* (1970), 397 U.S. 436, apply and require reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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